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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-974

SAMUEL L. POPKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINION BELOW

The opinion of the court of appeals of May 3, 1972, is published at 460 F. 2d 328 (Pet. App. A). Subsequent opinions and orders were entered May 17, 1972 (Pet. App. B); July 12, 1972 (Pet. App. C); October 13, 1972 (Pet. App. D); October 30, 1972 (Pet. E); November 7, 1972 (Pet. App. F); November 17, 1972 (Pet. App. H) and November 20, 1972 (Pet. App. I).

JURISDICTION

The judgments of the court of appeals were entered October 13 and November 20, 1972. The petition for a writ of certiorari was filed on January 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the issues raised in a petition for a writ of certiorari by a grand jury witness challenging an order

committing him for civil contempt are moot, where petitioner has been released from confinement, the grand jury has been discharged, and petitioner is no longer subject to any other collateral consequences arising out of his failure to testify.

2. Whether, assuming arguendo the case is not moot, the court of appeals properly affirmed a contempt order, where it found that the First Amendment claims asserted by petitioner were premature, and reserved decision on them pending a more complete record.

STATEMENT

Petitioner, an assistant professor of political science at Harvard University recognized as a research writer on the American involvement in the Vietnam war, was subpoenaed to appear before a federal grand jury in Boston on August 19, 1971.[1] His motions to quash and to compel disclosure of possible electronic surveillance were denied, but his testimony was not actually sought at that time. A second subpoena was served, compelling his reappearance on October 13. Called on October 14, he refused to testify and was directed to reappear on October 27. On that date he appeared but moved for a protective order to prevent further questions delving into "information obtained by him in his capacity as a scholar, author and teacher," and moved further for a transcript of his testimony and disclosure of alleged electronic surveillance.

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[1] The grand jury, convened on July 12, 1971, is the same one involved in *Gravel* v. *United States*, 408 U.S. 606, 608: "The crimes being investigated included the retention of public property or records with intent to convert (18 U.S.C. §641), the gathering and transmitting of national defense information (18 U.S.C. §793), the concealment and removal of public records or documents (18 U.S.C. §2071) and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. §371)."

His motion for a protective order was accompanied by the affidavits of some 24 colleagues in the academic field. All three motions were denied on October 28, after which applicant was granted transactional immunity upon application of the United States Attorney, 18 U.S.C. 2514, and ordered to testify. Excused once again, he was not asked to return until January 18, 1972. Following his refusal to answer three questions, a contempt order was sought and granted on March 21. Petitioner responded to the questions on March 27, purging himself of contempt and answered several further questions but again refused to answer several more, relying on his asserted First Amendment "scholar's privilege."

The district court ordered petitioner committed for refusal to answer nine questions. The court of appeals affirmed in part and reversed in part. Judges Aldrich and McEntee were of the view that six of the nine questions were "badly phrased" (Pet. App. A 39) and hence that petitioner could not be held in contempt for his failure to respond. While Judge Coffin, writing for the court of appeals, would have placed the decision on broader grounds, he joined in the holding on the "narrower formal" ground (Pet. App. A 35).

The court of appeals, however, held that petitioner would have to answer the following three questions (Pet. App. D 44):

> [1] Who are the persons you interviewed in order to acquire this knowledge of who participated in the Pentagon Papers study?
>
> [2] Who are those persons to whom you are referring with regard to conversations in the District of Massachusetts which led you to the knowledge of who the participants were in the Pentagon Papers study?

> [3] Did Daniel Ellsberg ever discuss with you the content or existence of the Pentagon Papers between January 1, 1971, and June 13, 1971?

In so holding, the court of appeals found that the question petitioner urges in this Court—the existence of a "scholar's privilege" under the First Amendment—was not presented by this record. The court explained that, while "the question posed to us" is whether the relationship between a scholar and his sources "gives the scholar a constitutionally based privilege not to testify which others do not possess," the "substantiated rationale of appellant and the questions put by the grand jury do not, in our opinion, quite meet head on" (Pet. App. A 32).

The basic rationale of the privilege asserted by petitioner, the court of appeals found, "bears on the right of the scholar not to disclose the identities of his 'contacts and sources'" (Pet. App. A 32). But this "underlying rationale falls short of immunizing a scholar from testifying about conversations with those who are not his sources" (Pet. App. A 34). The court of appeals therefore concluded that (Pet. App. A 33-34):

> * * * the two questions seeking the names of persons interviewed who gave him knowledge of participants in the Pentagon Papers study should be answered, at least to the extent that the persons were not government officials or other participant-sources. One of the questions, relating to persons in Massachusetts, seems not to be directed either to foreign affairs, intelligence, or defense officials in government or to any person, in or out of the government, in Vietnam. *Were it to become clear that a question delved into confidential relationships with such persons, we are not sure that the grand jury would see fit to pursue its inquiry. If it did, however, we would*

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at least have a factual setting enabling us to address the issue less theoretically.

This analysis also disposes of the question asking whether Ellsberg discussed with appellant the content or existence of the Pentagon Papers between January 1 and June 13, 1971. There is no representation that Ellsberg during that period was a government official, or otherwise a sensitive source, or even that Popkin had established a confidential relationship as to these matters with Ellsberg when the latter was a public official [emphasis added].

Accordingly, after delaying its order to resolve other issues in the case, the court of appeals on October 13, 1972, held that the contempt order, with respect to the three questions discussed above, would be affirmed unless within 21 days appellants stipulated in writing to answer them on demand (Pet. App. D 44-45).

The stipulation filed by petitioner in response to this order stated (Pet. App. G 48):

> The United States has interpreted the questions specified in this Court's Order of October 13, 1972, as asking only for the "disclosure of personal contact with fellow scholars concerning the mechanics of the production and dissemination of the 'Pentagon Papers' study" (Memorandum p. 4), and that "here, the witness is questioned not about his sources but merely about conversations with other scholars." (Memorandum p. 3) In light of those representations, I hereby stipulate that upon demand I will answer those questions. My refusals have always been directed toward questions requiring disclosure of confidential sources of a sensitive nature, not those relating merely to other scholars.

The "interpretation" to which petitioner referred was contained in our opposition to his earlier application to this Court for a stay of the contempt order pending a petition for certiorari. (The stay was denied.) There we interpreted the court of appeals' decision—set forth above—as "a ruling" that the questions which the petitioner was required to answer did not necessarily require disclosure of confidential sources; "they merely request disclosure of personal contact with fellow scholars concerning the mechanics of the production and dissemination of the 'Pentagon Papers' study" (Memorandum 4).

The court of appeals declined to accept petitioner's conditional stipulation (Pet. App. H 49).[2] After additional proceedings in the district court, in which petitioner agreed to answer the third question unconditionally (Pet. App. J 53), but would not stipulate to answer the other two questions if called before the grand jury, he was incarcerated for contempt on November 21, 1972.

ARGUMENT

1. We bring to the attention of the Court the following facts which show that the issue raised by the petitioner is moot.

On November 28, 1972, seven days after petitioner's incarceration, the grand jury was discharged. The statute providing for incarceration for civil contempt permits

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[2] By so doing it did not, as petitioner claims, "change its original Opinion of May 3, 1972" (Pet. 6-7). There is nothing inconsistent with the court of appeals' rejection of petitioner's conditional stipulation and its statement that if it became "clear that a question delved into a confidential relationship * * * we are not sure that the grand jury would see fit to pursue its inquiry. If it did, however, we would at least have a factual setting enabling us to address the issue less theoretically" (Pet. App. A 34).

the witness's confinement until he testifies or until the grand jury expires. See 28 U.S.C. 1826. A grand jury subpoena, moreover, has no life beyond that of the grand jury whose investigation gave rise to its issuance. There is no lawful basis upon which the United States can now recommit petitioner for past or present refusal to answer grand jury questions. The case is, therefore, moot.

Petitioner's response to the issue of mootness is "to point out two matters" (Pet. 7, n. 5): (1) that the grand jury in *United States* v. *Caldwell,* 408 U.S. 665, had expired, after oral argument, but prior to the decision in the case; and (2) that here the "government explicitly stated that it was asking for a discharge of the grand jury because it did not intend to present further evidence until after the case of *United States* v. *Ellsberg* had been completed, and implied that at that time petitioner might be recalled."

These "two matters," however, do not provide a sufficient answer to the plain fact that a "case" or "controversy" no longer exists between petitioner and the United States.

The facts in *United States* v. *Caldwell, supra,* are not the same as those here. Putting to one side the absence of any discussion of the mootness issue in the opinion of the Court,[3] it was apparent that, since the United States sought review from the adverse decision, it fully intended to call Caldwell before a new grand jury, as it had in fact done when the first grand jury had expired during the course of the proceedings (408 U.S. at 678-679). Here, on the other hand, a newly empanelled grand jury may not begin a follow-up investigation for some time,

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[3]The mootness issue in *Caldwell* was itself in a sense mooted by the fact that the other two cases decided therewith involved the same basic First Amendment claim as *Caldwell* (408 U.S. 679-680).

if ever. While we cannot state absolutely that no grand jury in the future will want to hear testimony from petitioner along the lines of the testimony he has previously refused to give in these proceedings, the government has no present intention of calling him, and it is possible that, in the intervening period, the information sought from petitioner will be obtained from other sources. In sum, it is at best speculative whether petitioner will ever be called before a related grand jury and even more speculative that, if recalled, he will be asked the same questions. Accordingly the case is moot. See *Local No. 86, Oil, Chemical and Atomic Workers International Union, AFL-CIO* v. *Missouri*, 361 U.S. 363, 368-369; *Commercial Cable Co.* v. *Burleson*, 250 U.S. 360; *Golden* v. *Zwickler*, 394 U.S. 103, 109. Cf. *Shillitani* v. *United States*, 384 U. S. 364, 372; *Parker* v. *United States*, 397 U.S. 96.

~~364, 372; *Parker* v. *United States*, 397 U.S. 96.~~

Moreover, even if it were likely that petitioner would be recalled and asked the same questions, this is not a case where the challenged action is one "capable of repetition, yet evading review" (*Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515; *Roe* v. *Wade*, No. 70-18, decided January 22, 1973, slip op., p. 10). The civil contempt statute involved here, 28 U.S.C. 1826(a), not only provides for bail pending a non-frivolous appeal of contempt order[4] but also contains a provision requiring a decision by the court of appeals within thirty days from filing of the notice of appeal. There is thus no substantial likelihood that petitioner will be unable to obtain full review of any meritorious

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[4]Compare, *In re Bart*, 82 S. Ct. 675, where Chief Justice Warren, in chambers, granted a stay of commitment because of "the likelihood that the normal course of appellate review might otherwise cause the case to become moot * * *" (82 S. Ct. at 676).

claim if he should ever again be called before another grand jury.

2. Petitioner's claims on the merits require only brief discussion.

a. There is no conflict between the opinion below and the holding of the Court of Appeals for the Ninth Circuit in *Bursey* v. *United States*, 466 F. 2d 1059, which petitioner cites for the proposition that the grand jury was required " 'to establish that there was a "substantial connection" between the information sought and the criminal conduct which the Government was investigating before the witnesses could be held in contempt for refusing to answer questions that cut deeply into First Amendment rights'" (Pet. 11).

The issue in *Bursey* did not involve any claim regarding "a scholar's privilege" or "newspaperman's privilege" to protect sources.[5] The case involved inquiries to newspaper editors requesting information as to who was responsible for the editorial conduct and distribution of a newspaper. These inquiries, the court of appeals found, "cut deeply into press freedom" and the "right of associational privacy" (466 F. 2d at 1084-1085).

The instant case involves an asserted First Amendment right of a scholar to protect his sources, a right that has never been recognized, and is indeed at odds with *Branzburg* v. *Hayes*, 408 U.S. 665. Moreover, since the Ninth Circuit's holding was expressly limited to inquiries which "cut deeply into First Amendment rights" (466 F. 2d at 1091), and since the court of appeals here found that petitioner's First Amendment claim was presented in

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[5]The court of appeals there observed (466 F. 2d at 1090): "News gathering is not involved in our case."

a "theoretical" context (Pet. App. A 34), and reserved decision on it, there is no direct conflict between the holding below and the Ninth Circuit's opinion in *Bursey*.

b. Contrary to petitioner's second ground for granting the writ, it is thus clear that the court of appeals has not "decided important questions of federal law which have not been but should be settled by this Court" (Pet. 12). Moreover, there is no support in *Branzburg* v. *Hayes*, *supra*, for the proposition, asserted here, that "the First Circuit should have applied a balancing test to determine whether the witness' First Amendment claims should be upheld" (Pet. 13-14).[6] This approach, which is based on the dissenting opinion in *Branzburg* (408 U.S. at 739-740), was in fact rejected by the Court (408 U.S. at 701-706).

Finally, petitioner's claim that "a witness before a grand jury, who has been granted limited transactional immunity, is entitled to be advised of the pertinence of questions asked" so that he may "make a sound judgment as to whether the question falls within the grand jury's power" (Pet. 20-21), was never asserted in the courts below, and has nothing to do with any First Amendment issue. The cases cited by petitioner stand for the proposition that "the [grand jury] witness may challenge whether the subject matter of a grand jury investigation is consonant with the statutory authorization for the grant of immunity and that, upon such a challenge, the Government must make at least a modest showing that it is."

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[6]Petitioner's "balancing" argument obviously goes well beyond the claim, answered in the opinion of the court of appeals (Pet. App. A 28-29), that the grand jury must make a preliminary showing that its questions were relevant to the inquiry it was conducting (see Pet. 18-20).

In re Vericker, 446 F. 2d 244, 247 (C.A. 2), followed in *Bursey* v. *United States, supra*, 466 F. 2d at 1091.

Petitioner here did not dispute the relevence of the grand jury's inquiries to the grant of transactional immunity he had received. Hence, the claim is not available to him here (*Lawn* v. *United States*, 355 U.S. 339, 362, n. 16).[7]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
A. WILLIAM OLSON,
Assistant Attorney General.
ROBERT L. KEUCH,
WILLIAM M. PIATT,
Attorneys.

MARCH 1973.

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[7] Moreover, this issue is of no continuing significance, and will not arise under the new use immunity statute (18 U.S.C. 6001, *et seq.*) sustained in *Kastigar* v. *United States*, 406 U.S. 441. Unlike the transactional immunity statute (18 U.S.C. 2514), pursuant to which petitioner was immunized, the use statute provides that testimony compelled under the statute may not be used against a witness in any criminal case, and more significantly, contains no limitation regarding the subject matter of investigation in which the immunity may be accorded. Hence no challenge can be made that the subject matter of the grand jury investigation is not consonant with the statutory authorization. The transactional immunity statute, 18 U.S.C. 2514, has been repealed, effective December 14, 1974.